No. 14881

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOSE ANGEL OCON,

Appellant,

vs.

ALBERT DEL GUERCIO, acting officer in charge of the Immigration and Naturalization Service, Los Angeles, California,

Appellee.

BRIEF FOR APPELLEE.

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TABLE OF AUTHORITIES CITED

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BRIEF FOR APPELLEE.

Jurisdiction.

Appellant, plaintiff below, sought to enjoin enforcement of an order and warrant of deportation outstanding against him, and to have said order and warrant declared invalid [R. 1-8].[1] The District Court entered judgment in favor of appellee [R. 28]. The Court below had jurisdiction under the provisions of Section 10 of the Act of

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[1]References to the typewritten Transcript of Record will be indicated "R". References to appellant's deportation hearing contained in a certified record of the Immigration and Naturalization Service, received in evidence as an exhibit and considered in its original form, will be indicated by "S.R."; while references to exhibits received in evidence at the deportation hearing will be indicated by "S.R. Ex." References to appellant's brief will be indicated by "Br."

June 11, 1946, commonly referred to as the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. A., Section 1009 (*Shaughnessy v. Pedreiro,* 349 U. S. 48 (1955)); and its judgment being a final decision, jurisdiction is conferred upon this Court by 28 U. S. Code, Section 1291.

Statement of the Case.

Appellant is an alien, a native and citizen of Mexico [R. 24, S. R. Exs. 2 and 3]. He was lawfully admitted to the United States in 1919, and has been a resident of the United States continuously since that time [R. 24, S. R. Ex. 2]. On September 1, 1953, a warrant of arrest was issued by the District Director, Immigration and Naturalization Service, Los Angeles, California, charging that appellant was subject to deportation under the Immigration and Nationality Act[2] in that after entry during May, 1919, he had been a member of the Communist Party of the United States; and on October 14, 1953, this warrant of arrest was served on appellant [R. 24, S. R. Ex. 1].

A deportation hearing was held at Los Angeles, California, on October 26, 1953 [S. R. 1-5], November 10, 1953 [S. R. 6-32], and November 19, 1953 [S. R. 33-137]. At this hearing, two witnesses, Louis Rosser [S. R. 15] and Daniel Scarletto [S. R. 102], testified on behalf of the Government as to appellant's membership in the Communist Party of the United States. Upon the advice of counsel, appellant refused to be sworn [S. R. 1, 6, 9], and refused to answer all questions [S. R. 1-3, 9-14, 135], except two questions relating to counsel by whom he was

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[2]Section 241(a)(6) of the Immigration and Nationality Act, 66 Stat. 204, 8 U. S. C. A., §1251(a)(6).

represented [S. R. 3-4]. Appellant cross-examined the witnesses introduced by the Government [S. R. 33-100, 109-134]; however, he offered no evidence or witnesses in his own behalf [S. R. 136]. At no time did appellant claim the privilege against self-incrimination as a ground for his refusal to answer questions.

On December 17, 1953, the Special Inquiry Officer who presided at the aforementioned deportation hearing rendered his decision, ordering that plaintiff be deported from the United States pursuant to law on the charge contained in the warrant of arrest. An administrative appeal was taken by appellant from the decision of the Special Inquiry Officer to the Board of Immigration Appeals and on June 16, 1954, said Board dismissed appellant's appeal.

On June 24, 1954, based upon the aforementioned order of deportation, a Warrant of Deportation was issued by the District Director, Immigration and Naturalization Service, Los Angeles, California, directing that appellant be deported from the United States.

On July 28, 1954, appellant filed a Complaint in the Court below, seeking to enjoin enforcement of the Order and Warrant of Deportation outstanding against him and seeking to have said order and warrant declared invalid [R. 1-8]. The District Court upheld the validity of the order and warrant of deportation and entered judgment in favor of appellee. This appeal from that judgment raises the following questions:

1. Is the finding that appellant is subject to deportation because he was a member of the Communist Party supported by reasonable, substantial and probative evidence?

2. Is the order of deportation outstanding against appellant rendered invalid because an inference was drawn from appellant's silence at the deportation hearing?

3. Is the order of deportation outstanding against appellant rendered invalid because the Special Inquiry Officer who presided at appellant's deportation hearing was not appointed, qualified and assigned pursuant to the Administrative Procedure Act?

4. Do the provisions of the Immigration and Nationality Act under which appellant was ordered deported, violate the Constitution?

Statutes Involved.

Section 241(a) of the Immigration and Nationality Act, 66 Stat. 204, 8 U. S. C. A., Section 1251(a), provides in pertinent part:

> "Sec. 241. (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> * * * * * * * *
>
> (6) is or at any time has been, after entry, a member of any of the following classes of aliens:
>
> * * * * * * *
>
> (C) Aliens who are members of or affiliated with (i) the Communist Party of the United States; * * *."

Section 242(b) of the Immigration and Nationality Act, 66 Stat. 209, 8 U. S. C. A. Section 1252(b), provides in pertinent part:

> "(b) A special inquiry officer shall conduct proceedings under this section to determine the deporta-

bility of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation. * * * Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe. Such regulations shall include requirements that—

* * * * * * * *

(4) no decision of deportability shall be valid unless it is based upon reasonable substantial, and probative evidence."

Section 101(b)(4) of the Immigration and Nationality Act, 66 Stat. 171, 8 U. S. C. A., Section 1101(b)(4) provides:

"(4) The term 'special inquiry officer' means any immigration officer who the Attorney General deems specially qualified to conduct specified classes of proceedings, in whole or in part, required by this Act to be conducted by or before a special inquiry officer and who is designated and selected by the Attorney General, individually or by regulation, to conduct such proceedings. Such special inquiry officer shall be subject to such supervision and shall perform such duties, not inconsistent with this Act, as the Attorney General shall prescribe."

ARGUMENT.

I.

Summary.

The standard embodied in the Immigration and Nationality Act requiring reasonable, substantial and probative evidence to support an order of deportation is not new in deportation proceedings, but was applied by courts prior to this Act in habeas corpus proceedings. In determining whether this standard has been met, a court of review will not substitute its judgment for that of the immigration authorities, but will invalidate an order of deportation only if the alien would have been entitled to a directed verdict in his favor had the issue of his deportability been tried before a jury.

There is reasonable, substantial and probative evidence to support the finding that appellant was a member of the Communist Party. The uconntradicted testimony of two witnesses, former members of the Communist Party, identified appellant as having been a member of the Party at the same time; as having attended numerous meetings of the Communist Party which were restricted solely to members, and some of which were restricted to leaders of the Party; as having paid dues to the Communist Party; as having frequented Communist Party headquarters; and as having participated in picnics, mass meetings, and picket lines sponsored by the Communist Party. Confronted with this testimony, appellant remained silent. He did not testify or offer any evidence whatever in his own behalf.

Appellant did not impeach the testimony of these witnesses. The minor discrepancies developed during cross-examination, relating for the most part to collateral mat-

ters, were of little significance. They were not "paid informers" as appellant seeks to label them, but witnesses. Moreover, the credibility of witnesses is for the determination of the trier of facts, in this instance the Special Inquiry Officer.

An inference was properly drawn from appellant's silence at the deportation hearing. The fact that he refused to take an oath does not preclude this inference, since he was under a legal obligation to be a witness and could have been compelled to take the oath. While there is authority to the effect that an inference may be drawn from silence even though the privilege against self-incrimination is claimed, the present decision need not extend so far, since appellant did not assert the privilege. In the absence of a claim, the privilege may not be considered. Moreover, independent of the inference drawn from appellant's silence, there is reasonable, substantial and probative evidence to support the finding that he was a member of the Communist Party.

The Special Inquiry Officer was not required to be appointed, qualified or assigned pursuant to the Administrative Procedure Act, since the Immigration and Nationality Act expressly provides for his appointment and supervision. This would seem to have been settled by *Marcello v. Bonds,* 349 U. S. 302 (1955).

Since the decision by the Supreme Court of *Galvan v. Press,* 347 U. S. 522 (1954), reh. den. 348 U. S. 852, the constitutionality of the statute under which appellant was ordered deported is no longer an open question.

II.

The Finding That Appellant Is Subject to Deportation Because He Was a Member of the Communist Party Is Supported by Reasonable, Substantial, and Probative Evidence.

A. Standard of Proof Required.

Appellee concedes that a decision of deportability to be valid must be supported by "reasonable, substantial and probative evidence." (Sec. 242(b)(4) of the Immigration and Nationality Act, 66 Stat. 210, 8 U. S. C. A., Sec. 1252(b)(4); see also, Sec. 10(e) of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. A., Sec. 1009(e).) However, appellee disagrees with the position of appellant that this standard is a novelty in deportation proceedings (Br. 6, 21). While in the Administrative Procedure Act and the Immigration and Nationality Act, Congress adopted the "substantial evidence"[3] rule, in so doing it merely codified and made definite a standard which the courts were already applying upon the review of deportation orders in habeas corpus proceedings.

Maita v. Haff, 116 F. 2d 337, 338 (C. A. 9, 1940);

Kielema v. Crossman, 103 F. 2d 292, 293 (C. A. 5, 1939);

Daskaloff v. Zurbrick, 103 F. 2d 579 (C. C. A. 6, 1939);

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[3]The terms "reasonable" and "probative" would seem to add nothing, since these terms are included within the concept of "substantial evidence." See, *Consolidated Edison Co. v. N. L. R. B.,* 305 U. S. 197 (1938), at page 229, where substantial evidence is defined as follows: "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a *reasonable* mind might accept as adequate to support a conclusion. . . ." And on page 230 the Court indicated that evidence would not be substantial if it was without a "basis in evidence having *rational probative force.*"

Morrow v. Tillinghast, 35 F. 2d 183, 184 (C. C. A. 1, 1929);

Palmer v. Ultimo, 69 F. 2d 1, 2 (C. C. A. 7, 1934);

United States ex rel. Schlimmgen v. Jordan, 164 F. 2d 633, 634 (C. C. A. 7, 1947).

In framing the evidentiary requirements of Section 242(b)(4), Congress did not consider that it was setting up new standards. The bills which culminated in the 1952 Act emerged from a detailed and intensive study of our immigration and naturalization systems made by the Senate Judiciary Committee. In 1950 the Committee rendered a comprehensive report (S. Rep. 1515, 81st Cong., 2d Sess.) entitled "The Immigration and Naturalization Systems of the United States," *embodying the Congressional understanding of existing law* upon which the 1952 Act was based. On page 629 of this report the Committee stated:

> ". . . In a habeas corpus proceeding, based on a deportation case, the Court determines whether or not there has been a fair hearing, whether or not the law has been interpreted correctly, and whether or not there is *substantial evidence* to support the order of deportation." (Emphasis added.)

In determining whether substantial evidence exists to support an order of deportation, a Court will not substitute its judgment for that of the immigration authorities (*Taranto v. Haff,* 88 F. 2d 85, 87 (C. C. A. 9, 1937)). The present order of deportation should be declared invalid *only if appellant would have been entitled to a directed verdict in his favor had the issue of his membership in the Communist Party been tried before a jury* (*N. L.*

R. B. v. Columbian Enameling and Stamping Company, 306 U. S. 292, 300 (1939); Stason, " 'Substantial Evidence' in Administrative Law," 89 U. of Pa. L. Rev. 1026, 1035-1051).

In *United States v. Fulkerson,* 67 F. 2d 288 (C. C. A. 9, 1933), this Court enunciated the rule governing directed verdicts in the following language (p. 290):

> "It is well settled that, if there is any substantial evidence to which the jury may properly give credence and which, viewed in its most favorable aspect, would sustain a verdict favorable to the plaintiff, then the court is not authorized to enter an order of dismissal or to direct the jury to return a verdict for defendant. * * *."

Other cases illustrating this rule are:

Gunning v. Cooley, 281 U. S. 90, 94 (1930);

Butte Copper & Zinc Co. v. American, 157 F. 2d 457 (C. C. A. 9, 1946);

United States v. Hartley, 99 F. 2d 923, 925 (C. C. A. 9, 1938).

B. Testimony of Louis Rosser—Summary.

Witness Rosser testified that he (the witness) was a member of the Communist Party of the United States in Southern California from 1932 up to December, 1944 [S. R. 16]; that he was a full time functionary in the Communist Party from about three months after he joined until about six months before he quit the Party [S. R. 19]; that he (the witness) held various positions of leadership in the Communist Party [S. R. 17-18].

That appellant was present at a meeting, taking place during the summer of 1939, of a fraction of the Workers Alliance [S. R. 19]; that about ten persons attended

this meeting [S. R. 24]; that the meeting was attended only by top Communists within the Workers Alliance [S. R. 25]; that the witness and other leaders of the Communist Party had planned the meeting in advance [S. R. 72, 73]; and that the meeting was devoted to the policy and program of the Communist Party being pushed through the Workers Alliance [S. R. 25];

That appellant was present at a meeting of the Communist Party during 1939; that about twelve persons were present at this meeting; that the witness spoke at this meeting on the Party's program of mobilizing the unemployed to fight against the war effort [S. R. 21]; that the meeting was restricted solely to members of the Communist Party of the United States; and that he (the witness) knew this because he was responsible for the work of the unit which was meeting [S. R. 21];

That appellant was present at a conference in the fall of 1939 held at Embassy Hall, Los Angeles, California [S. R. 25]; that the purpose of the conference was to give the Communist leaders the facts of why Stalin made a pact with Hitler [S. R. 25]; that this conference was restricted solely to members of the office staff of the County Committee of the Communist Party, Section Organizers, and to delegates assigned by the units of the Communist Party; that the head of each group checked the member's name off at the door [S. R. 26]; that the witness' name was checked off at the door [S. R. 76];

That appellant was present at a meeting in the summer of 1940 of the Communist Party unit to which appellant belonged; that this meeting took place in a private home; that about 8 persons were present; that only members of the Communist Party were present at this meeting; that

during this period every unit organizer had been informed to tighten the reins of the security of the party; and that only members of the Party were notified to attend meetings [S. R. 26-27];

That the witness attended picnics, mass meetings, and picket lines sponsored by the Communist Party, at which appellant was present [S. R. 27]; that appellant and the witness worked daily in the unemployed movement [S. R. 28]; that appellant was on one of the commissions of the Communist Party [S. R. 28]; and that he saw appellant at Communist Party headquarters at various times during the years 1939, 1940, 1941 and 1942 [S. R. 29];

That the last time he saw appellant within the Communist Party was at a conference in the fall of 1942; that this conference was restricted solely to members of the Communist Party, and that it was further restricted to the county committee of the Communist Party, and to those delegates sent by branches, units or fractions; that each person responsible for the group from his delegation was at the door and checked off the people for which he was responsible as they came in [S. R. 29-30];

That to his knowledge, appellant was a member of the Communist Party of the United States from the period 1937 to 1942 [S. R. 30].

C. Testimony of Daniel Scarletto—Summary.

Witness Scarletto testified that he (the witness) was a member of the Communist Party from 1947 to 1952 in the Los Angeles area; that he became a member of the Communist Party at the suggestion of the Federal Bureau of Investigation to secure information for the United States Government; that he was press director when he was in the El Sereno Club of the Communist Party; that

he was organization secretary when he was in the Mexican Concentration Club of the Communist Party; and that as organization secretary he handled the dues and finances and political guidance for the club [S. R. 103-104];

That after he was in the Mexican Concentration Club, he (the witness) was given a list with appellant's name on it; that he first met appellant at a meeting at the home of Gertrude Stoughton in El Sereno; that about 7 or 8 people were present at this meeting; that this meeting was restricted to members of the Communist Party, and that in order to assure that only Communist Party members were in attendance, automobiles were parked several blocks away from the house where the meeting was to be held; and that "we never knew where the meeting was going to be sometimes until about an hour or so before it happened and all the members didn't know at all times where the meeting would be. They were picked up and taken to the meeting" [S. R. 105];

That he was present at probably 15 or 20 other meetings of the Communist Party at which appellant was present [S. R. 107]; that in his position as organization secretary he collected Communist Party dues from appellant on about 10 occasions at the rate of 10 cents per month; and that he turned over the money that he collected for dues to the Section Organizer of the Communist Party [S. R. 107-108, 127-129]; that to his knowledge appellant was a member of the Communist Party of the United States during the period 1949 through 1950 [S. R. 109].

D. Probative Value of the Evidence.

The uncontradicted testimony of two witnesses, former members of the Communist Party, identified appellant as having been a member of the Communist Party of the United States; as having attended numerous meetings of the Communist Party which were restricted solely to members of the Party and some of which were restricted to leaders of the Party; as having paid dues to the Communist Party, as having frequented Communist Party Headquarters, and as having participated in picnics, mass meetings, and picket lines sponsored by the Communist Party. This, in itself, constitutes reasonable substantial and probative evidence of appellant's membership in the Communist Party. Confronted with this testimony, appellant remained silent. He did not testify or offer any evidence whatever in his own behalf. As will be more fully discussed in Part III of Argument, an inference may be drawn from this silence, that appellant was in fact a member of the Communist Party.

Appellant complains that witnesses Rosser and Scarletto did not personally call the meetings described by them or invite persons to attend, concluding that they had no personal knowledge that the meetings were in fact restricted solely to members of the Communist Party. This argument assumes that a fact can only be proved by direct evidence. Circumstantial evidence, however, is not an inferior species, and may serve to prove a fact as convincingly as direct evidence (*Rocona v. Guy F. Atkinson Co.*, 173 F. 2d 661, 665 (C. A. 9, 1949); 32 C. J. S., Evidence, Sec. 1039). In the case at bar the witnesses described in detail the security measures employed to insure that only members of the Communist Party attended the

meetings. Witness Rosser, particularly, was a leader in the Communist Party and was undoubtedly well acquainted with the methods employed to prevent the intrusion of outsiders. Under such circumstances, a weighty inference arises that appellant was a member of the Communist Party of the United States; not only because the meetings which he attended were restricted to members of the Communist Party, but also because of the unlikelihood that one not a member would be present at numerous meetings of the Communist Party at which stringent security measures were taken to insure that only members attended. It is hardly conceivable that appellant's attendance at these meetings was fortuitous.

The language of *Bridges v. United States,* 199 F. 2d 811, 836 (C. A. 9, 1952), reversed on other grounds, 346 U. S. 209, concerning the evidentiary value of attendance at "closed" meetings of the Communist Party cannot be lifted out of context and applied to the case at bar. In the *Bridges* decision, a criminal case, Bridges himself, a labor union leader, admitted attendance at Communist Party meetings and admitted that his union was offered and accepted aid from the Communist Party and its paper "The Daily Worker" (199 F. 2d 836-837). Such evidence of cooperation between Bridges' union and the Communist Party might well explain Bridges' presence at meetings of the Communist Party, ordinarily closed, consistent with non-membership. In the case at bar, however, there is nothing to explain why appellant found himself at numerous meetings of the Communist Party, all of them closed, and some of them restricted to top leaders of the Community Party.

Moreover, evidence apart from appellant's attendance at "closed" meetings established his membership in the Com-

munist Party. Appellant paid dues as a member of the Communist Party [S. R. 107-108, 127-129], frequented Party Headquarters [S. R. 29], and participated in carrying out the Communist Party program [S. R. 27, 28]. This is reasonable, substantial, and probative evidence of his membership in the Communist Party. Clearly, appellant would not have been entitled to a directed verdict in his favor had the issue of his membership been tried before a jury.

E. Credibility of the Witnesses.

Appellant cross-examined witnesses Rosser and Scarletto exhaustively concerning age (a matter necessarily based upon information obtained from others), schooling, places of employment, and other collateral matters. The minor discrepancies developed during the course of this cross-examination were of little significance (*Mar Gong v. Brownell,* 209 F. 2d 448, 451-452 (C. A. 9, 1954)).

The cross-examination of witness Rosser concerning his activities while attending school, when tested by judicial standards, did not tend to impeach. Particular acts of misconduct, not resulting in conviction, may not be used for impeachment purposes (*Ingram v. United States,* 106 F. 2d 683, 684 (C. C. A. 9, 1939), and authorities cited therein). Similarly, the few misdemeanors of which Rosser admitted conviction did not afford a basis for impeachment (*Fay v. United States,* 22 F. 2d 740 (C. C. A. 9, 1927); 8 Cyc. of Fed. Proc., Sec. 26.107; Cal. Code Civ. Proc., Sec. 2051.)

Appellant seeks to attack the credibility of witness Scarletto because he stated falsely in an application for employment that he was not a member of the Communist Party when in fact he was (Br. 11). As previously mentioned, witness Scarletto joined the Communist Party at the suggestion of the Federal Bureau of Investigation. Having so joined, he would naturally be expected to conceal his membership in the Party from all except other members and the Federal Bureau of Investigation.

Appellant characterizes witnesses Rosser and Scarletto as "paid professional witnesses" (Br. 13) and "paid informers" (Br. 17). The record will not support this characterization. At the time of the deportation hearings, neither Rosser nor Scarletto were in the employ of the government but were witnesses who received for their services the fee customarily paid ex-Communists who testify in proceedings before the Immigration and Naturalization Service (See U. S. News and World Report, February 18, 1955, page 83, for a discussion of the distinction between witnesses and informers, as well as the range of fees in each class). At the deportation hearings relating to appellant, the fee for each witness was $25.00 per day [S. R. 89, 131]. Witness Rosser testified for two days and witness Scarletto for one day; and they should have received $50.00 and $25.00 respectively. Certainly, these nominal sums, little more than enough to reimburse the witnesses for their absence from employment, can create no inference of bias.

Moreover, the credibility of witnesses, even where the evidence is conflicting, is to be determined by the trier of fact, in this instance the Special Inquiry Officer.

Bridges v. United States, 199 F. 2d 811, 839 (C. A. 9, 1952), reversed on other grounds, 346 U. S. 209;

Morikichi Suwa v. Carr, 88 F. 2d 119, 121 (C. C. A. 9, 1937);

Taranto v. Haff, 88 F. 2d 85 (C. C. A. 9, 1937);

Acosta v. Landon, 125 Fed. Supp. 434, 438 (S. D. Calif., 1954).

Bridges v. United States, supra, although it involved an appeal from a criminal conviction by a jury, affords an excellent analogy to a court review of an administrative decision. This Court there declared (p. 839):

> "The question whether these events did or did not occur was typically one for the jury. In general this case presents no circumstances different from those which constantly appear where the testimony of witnesses is sharply in conflict. The special function of the jury, in our system, is to deal with such matters. *No appellate judge is ever in a position to reconstruct for himself, from a printed record, the multitude of things which bring conviction to a juror's mind—the demeanor of the witness, his apparent candor or evasiveness, his assurance or hesitation, and even his facial expressions or the sound of his voice."* (Emphasis added.)

The rule quoted above should apply with even greater force where, as in the instant case, there was no conflict in the testimony, but where the uncontradicted testimony of witnesses for the government established appellant's membership in the Communist Party of the United States.

III.

The Order of Deportation Was Not Rendered Invalid Because an Inference Was Drawn From Appellant's Silence at the Deportation Hearing.

At the deportation hearing appellant, upon the advice of counsel, refused to be sworn [S. R. 1, 6, 9] and refused to answer all questions [S. R. 1-3, 9-14, 135], except two [S. R. 3-4]. After witnesses had testified concerning appellant's membership in the Communist Party, he offered no evidence or witnesses on his own behalf [S. R. 136]. Appellant now complains that the Special Inquiry Officer and the Board of Immigration Appeals relied in part on appellant's silence. It is well settled, however, that an inference may be drawn from the refusal of an alien to testify on his own behalf in deportation proceedings.

United States ex rel. Vajtauer v. Commissioner of Immigration, 273 U. S. 103, 111-113 (1927);

Bilokumsky v. Tod, 263 U. S. 149 (1923);

Hyun v. Landon, 219 F. 2d 404, 409 (C. A. 9, 1955), cert. granted, 24 L. W. 3093;

Kunimori Ohara v. Berkshire, 76 F. 2d 204, 207 (C. C. A. 9, 1935);

Saksagansky v. Weedin, 53 F. 2d 13, 16 (C. C. A. 9, 1935).

See also:

Local 167 v. United States, 291 U. S. 293, 298 (1934);

Kirby v. Tallmadge, 160 U. S. 379, 382 (1896);

Wigmore on Evidence, 3d Ed., Vol. II, Secs. 285-289.

Appellant seeks to distinguish the *Vajtauer* and *Bilokumsky* decisions because they were proceedings in habeas corpus, decided prior to the Immigration and Nationality Act of 1952. However, as previously adverted to in Part II A of Argument, the courts required substantial evidence to support an order of deportation, even though the order was reviewed by way of habeas corpus.[4] Moreover, if an inference may arise from silence in deportation proceedings, it is difficult to perceive how the type of review afforded can detract from its evidentiary value.

During the deportation hearing appellant refused to be sworn [S. R. 1, 6, 9]. He now urges that since he refused to take the oath he was under no duty to speak, and that as a consequence no inference can be drawn from his silence (Br. 20). This argument fails to consider that appellant was under a legal duty to be sworn as a witness and could have been compelled to take the oath. An alien in a deportation proceeding against him may be compelled to be a witness, since these proceedings are civil and not criminal in nature (*Bilokumsky v. Tod,* 263 U. S. 149, 155 (1923); and a witness has no right to refuse to be sworn, even though he may have a right,

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[4]The fact that, instead of using the phrase "substantial evidence", the court referred to "some evidence" in *Vajtauer* (p. 106) and to "evidence" in *Bilokumsky* (p. 153) is not controlling. See, *Consolidated Edison Co. v. N. L. R. B.,* 305 U. S. 197, 229 (1938), where the Supreme Court found that the Court of Appeals in saying that the record was not "wholly barren of evidence" meant substantial evidence.

when questioned, to refuse to answer on constitutional grounds.

Mulloney v. United States, 79 F. 2d 566, 578-579 (C. C. A. 1, 1935);

O'Connell v. United States, 40 F. 2d 201, 205 (C. C. A. 2, 1902), cert. dismissed 296 U. S. 667;

Wigmore on Evidence, 3d Ed., Vol. VIII, Sec. 2268.

Appellant should not be permitted to avoid the inference which would ordinarily arise from his silence merely because he refused to take an oath which he was under a legal obligation to take.

Appellant also urges that no inference may be drawn from his silence because the testimony called for "could be incriminating" (Br. 21). This Court in *Hyun v. Landon, supra,* ruled that an inference might be drawn from the refusal of an alien to testify in deportation proceedings, even though such refusal was accompanied by a claim of the privilege against self-incrimination. The decision in the case at bar, however, need not extend so far, *since at no time during the deportation hearing did appellant assert the privilege against self-incrimination.* In the absence of a claim, the privilege may not be considered.

Rogers v. United States, 340 U. S. 367 (1951);

United States ex rel. Vajtauer v. Commissioner of Immigration, 273 U. S. 103, 112-113 (1937);

Wigmore on Evidence, 3d Ed., Vol. VIII, Sec. 2268.

Even if it be assumed that an inference from appellant's silence was improperly drawn, the present order of deportation would not thereby be invalidated; since the testimony of witnesses Rosser and Scarletto alone is sufficient to support the order. The mere fact that incompetent evidence is received and considered in a deportation hearing does not operate to render the proceedings invalid.

Navarrette-Navarrette v. Landon, 223 F. 2d 234, 237 (C. A. 9, 1955);

Hyun v. Landon, 219 F. 2d 404, 408 (C. A. 9, 1955), cert. granted 24 L. W. 3093.

IV.

The Order of Deportation Was Not Rendered Invalid Because the Special Inquiry Officer Who Presided at Appellant's Deportation Hearing Was Not Appointed, Qualified, or Assigned Pursuant to the Administrative Procedure Act.

Appellant contends "that he was entitled to a hearing based upon the terms of the Administrative Procedure Act and was entitled to have presiding at that hearing a Special Inquiry Officer appointed, qualified and assigned pursuant to that Act" (Br. 24). This contention loses all force since the decision by the Supreme Court of *Marcello v. Bonds,* 349 U. S. 302 (1955). In *Marcello,* the Court made it clear that the Administrative Procedure Act had no application to deportation hearings; and that in enacting the Immigration and Nationality Act "Congress was setting up a specialized administrative procedure applicable to deportation hearings" (348 U. S. at p. 308).

Appellant urges that the Supreme Court in *Marcello* "did not decide or even consider the applicability of Section 11 of the Administrative Procedure Act concerning the appointment, qualification and assignment of hearing

officers" (Br. 24-25). Appellee disagrees. While in *Marcello,* it was conceded that the appointment provisions of the Administrative Procedure Act were inapplicable to deportation proceedings, the Supreme Court was careful to place its stamp of approval on this concession in the following language (p. 305):

> "Petitioner concedes that §242(b) of the Immigration Act, authorizing the appointment of a 'special inquiry officer' to preside at the deportation proceedings, *does not conflict with the Administrative Procedure Act, since §7(a) of that Act excepts from its terms officers specially provided for or designated pursuant to other statutes*[5] . . ." (Emphasis added.)

The appointment of special inquiry officers is specifically provided for in the Immigration and Nationality Act, and they are expressly placed under the supervision of the Attorney General. (Sec. 101(b)(4) of the Immigration and Nationality Act, 66 Stat. 171, 8 U. S. C. A., Sec. 1101(b)(4); Sec. 242(b) of the Immigration and Nationality Act, 66 Stat. 209, 8 U. S. C. A. 1252(b)). The Supreme Court was of the view that the appointment, qualification and assignment of special inquiry officers were excepted from the provisions of Section 11 of the Administrative Procedure Act.

To the same effect:

> *Couto v. Shaughnessy,* 123 Fed. Supp. 926, 930-931 (S. D. N. Y., 1954), affirmed 218 F. 2d 758, cert. den. 349 U. S. 952.

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[5]In a footnote to this quotation the Supreme Court observed: "Section 7(a) of the Administrative Procedure Act directs that, in general, administrative hearings shall be held before hearing officers appointed pursuant to §11 of the Act."

V.

The Provisions of the Immigration and Nationality Act Under Which Appellant Was Ordered Deported Do Not Violate the Constitution.

Appellant was ordered deported from the United States under the provisions of Section 241(a) of the Immigration and Nationality Act, as an alien who after entry had been a member of the Communist Party of the United States. He now challenges the constitutionality of this statute on the ground that it violates due process, constitutes a Bill of Attainder and an *Ex Post Facto* law, and violates freedom of speech and association. These contentions, however, have already been rejected.

Galvan v. Press, 347 U. S. 522 (1954), reh. den. 348 U. S. 852;

Harisiades v. Shaughnessy, 342 U. S. 580 (1952), and cases cited therein;

Hyun v. Landon, 219 F. 2d 404, 409 (C. A. 9, 1955).

In *Galvan,* the Supreme Court upheld the validity of Section 22 of the Internal Security Act of 1950, 64 Stat. 1006, 1008, which made present or former membership in the Communist Party a ground for deportation. No reason is apparent why the validity of the present statute should not also be upheld. The two statutes, in all essential respects, are identical. The arguments as to unconstitutionality advanced by appellant are no more convincing than those presented to the Supreme Court in the cases cited above. Further contention as to the constitutionality of the statute under which appellant was ordered deported would seem to be foreclosed.

Appellant may feel that since his deportation was ordered pursuant to the Immigration and Nationality Act of 1952, an opportunity is thereby afforded to reopen the constitutional issues raised in *Galvan*. The language of that case, however, precludes any such attitude. Justice Frankfurter, after noting that the constitutional arguments advanced by Galvan were contrary to a long and unbroken line of decisions, concluded (p. 531-532):

> *"We are not prepared to deem ourselves wiser or more sensitive to human rights than our predecessors, especially those who have been most zealous in protecting civil liberties under the Constitution,* and must therefore under our constitutional system recognize congressional power in dealing with aliens, on the basis of which we are unable to find the Act of 1950 unconstitutional. * * *." (Emphasis added.)

Conclusion.

Wherefore, for the reasons set forth above, it is respectfully submitted that the judgment of the District Court in favor of appellee, denying the relief prayed for in appellant's Complaint, should be affirmed.

Respectfully submitted,

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